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In the Supreme Court of the United States

OCTOBER TERM, 1980

GERALD E. WALLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the prosecutor failed to disclose a statement made by petitioner to a government agent.

2. Whether the prosecutor's proof at trial showed multiple conspiracies rather than a single conspiracy as alleged in the indictment.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 2

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Andresen v. *Maryland*, 427 U.S. 463 6

Barnes v. *United States*, 412 U.S. 837 6

Berger v. *United States*, 295 U.S. 78 7

Blumental v. *United States*, 332 U.S. 539 6

United States v. *Barrentine*, 591 F. 2d 1069, cert. denied, 444 U.S. 990 5

United States v. *Bobo*, 586 F. 2d 355, cert. denied, 440 U.S. 976 6

United States v. *Eisler*, 567 F. 2d 814 5

United States v. *Havens*, No. 79-305 (May 27, 1980) 4

United States v. *Johnson*, 525 F. 2d 999 5

United States v. *Lewis*, 511 F. 2d 798 5

Page

Statutes, regulation and rules:

18 U.S.C. 371 1
18 U.S.C. 472 1
28 C.F.R. 2.20 6
Fed. R. Crim. P. 16 2
W.D. Pa. R. 24 2

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A-2 to A-4) is not reported. The opinion of the district court (Pet. App. D-1 to D-9) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1980. A petition for rehearing was denied on July 9, 1980 (Pet. App. B-1). The petition for a writ of certiorari was filed on September 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on one count of conspiracy to possess, receive, and deliver counterfeit federal reserve notes, in violation of 18 U.S.C. 371. He was also convicted on one count of possession of counterfeit federal reserve notes, in violation of 18 U.S.C. 472. He was sentenced to concurrent terms of three years' imprisonment (Pet. App. C-1). The court of appeals affirmed (Pet. App. A-2 to A-4).

The evidence at trial established that in 1978 and 1979 petitioner and his co-defendants participated in a scheme to distribute counterfeit money in Pennsylvania and West Virginia. Petitioner's participation in the scheme was proven by the testimony of two of his accomplices, Henry Rischitelli and John Galayda. That testimony showed that Rischitelli repeatedly sold counterfeit $20 and $100 bills to other co-conspirators for distribution. Petitioner met Rischitelli in the winter of 1978 and asked to buy some counterfeit money (Tr. 391). Rischitelli sold petitioner counterfeit $100 bills with a face value of $35,000 in early 1979 (Tr. 171-180). Petitioner later met with Galayda and

Lawrence Victoria to discuss the counterfeit money. Petitioner showed them the counterfeit bills, which Victoria described as "good stuff" (Tr. 41-43; Gov't Exh. 1-A). Petitioner then gave Victoria a package of counterfeit $100 bills as a sample and set a purchase price (Tr. 44-45).

Rischitelli also sold counterfeit $20 bills to Victoria (Tr. 170-171), who in turn transmitted the bills to Galayda. Galayda then forwarded the counterfeit bills for distribution in West Virginia (Tr. 33-34). Petitioner admitted to a government agent that certain people who worked with him had counterfeit $20 bills in their possession (Tr. 1480-1482). He also stated to the agent that he had sources that could lead to the discovery of the counterfeit $20 bills (Tr. 1483).

ARGUMENT

1. Prior to trial, petitioner moved for disclosure of all statements made by him to law enforcement officers pursuant to Fed. R. Crim. P. 16 and Local Rule 24 (Pet. App. E-1, F-1 to F-3). In response, the government turned over to petitioner all of its memoranda summarizing petitioner's interviews and statements. It also made its case agent (Agent Elder) available to defense counsel for interviews concerning his knowledge of petitioner's statements (Tr. 1184-1190). Petitioner nonetheless contends (Pet. 9-15) that the government failed to disclose a statement that he made to Agent Elder in April 1979, and that this statement was improperly used to impeach his credibility at trial.

a. Petitioner testified on his own behalf at trial. During the course of his testimony, he described several conversations with Agent Elder (Tr. 1138-1147). On cross-examination, petitioner was asked whether he made certain statements to Elder at various times during the investigation. He was asked whether he said he was a

gambler rather than a counterfeiter (Tr. 1175); whether he said that he suspected his co-defendants to be counterfeiters (Tr. 1178); and whether he said in April 1979 that he was close to the "printer" and could obtain a million dollars worth of counterfeit bills (Tr. 1180). Petitioner gave negative answers to each question. On rebuttal, Agent Elder testified that petitioner had told him that he was a gambler rather than a counterfeiter (Tr. 1479); that he had said that he knew the persons who possessed the counterfeit $20 and $100 bills (Tr. 1481-1484); and that, in April 1979, he also had said that he could obtain a million dollars worth of counterfeit money from the printer (Tr. 1488).

Petitioner contended in the district court that the government improperly failed to make pre-trial disclosure of his April 1979 statement (Tr. 1181). The prosecutor responded that he had disclosed all memoranda concerning petitioner's statements to defense counsel. Agent Elder also testified that he made available all of his notes concerning meetings with petitioner, including a case synopsis that described the April 1979 meeting in which petitioner had stated that he could obtain one million dollars in counterfeit currency. Agent Elder further testified that he read portions of this synopsis aloud for defense counsel (Tr. 1190-1192).[1]

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[1]Elder had not prepared a separate memorandum or report concerning the April 1979 conversation. He believed that petitioner's assertion that he could obtain one million dollars in counterfeit currency was false because, to his knowledge, there was only $100,000 in counterfeit currency in circulation in the area. Elder's case summary, referring to the April conversation, was not turned over during pretrial discovery because it was not prepared until shortly before trial, at which time it was read to defense counsel (Tr. 1191-1198). As the district court explained (Pet. App. D-7): "Apparently, Agent Elder did not make any contemporaneous notation or report of the comments made by Walls during their April meeting because

b. The foregoing demonstrates that there was no withholding of information from petitioner's counsel, and certainly no element of bad faith in complying with pretrial discovery requirements.[2] In any event, even if the government had withheld the statement in question, any error was harmless in the context of this case. As the district court explained (Pet. App. D-7):

> [W]e note that the statements offered by the Agent were in the nature of rebuttal to Walls' earlier account of the April meeting. The statements were not offered by the government as confessions or substantive evidence, but as attacks on the creditability of Walls. The statements were cryptic and equivocal. * * * Moreover, we do not believe that the statements were prejudicial to defendant, given the presence of other substantial evidence of his involvement in the activities charged in the indictment.

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he did not believe the statements were serious or credible. The Agent did reduce his recollections to writing, however, in preparation for trial. During a side-bar conference on an objection by Walls' counsel, Agent Elder testified that he had made all of his notes of the meeting available for inspection by counsel." Notwithstanding Agent Elder's testimony, defense counsel asserted that he was not given access to the synopsis of the April 1979 meeting.

[2]Indeed, even if the April statement had been withheld due to inadvertence, and even if it had a direct bearing on the question of guilt or innocence, we believe that it would have been proper to use the statement on cross-examination to impeach petitioner's false testimony on the witness stand. See *United States* v. *Havens*, No. 79-305 (May 27, 1980), slip op. 6-7 ("We have repeatedly insisted that when defendants testify, they must testify truthfully or suffer the consequences. * * * It is essential, therefore, to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth").

Petitioner's April 1979 statement was similar to his other statements to Agent Elder that he knew the persons possessing the counterfeit $20 bills (Tr. 1480-1481), that he knew the persons dealing in counterfeit $100 bills (Tr. 1482), that he had sources that would lead to the counterfeit $20 bills (Tr. 1483), and that he could get a sample of counterfeit $100 bills because he knew the men who had them (Tr. 1484). Petitioner's April 1979 statement added little to these earlier admissions, all of which were disclosed to defense counsel before trial. None of them deterred petitioner from taking the witness stand and giving contradictory testimony. Under these circumstances, even assuming (contrary to the testimony of Agent Elder) that the government did not make pretrial disclosure to petitioner of the April 1979 statement, any such failure was harmless. See *United States* v. *Johnson,* 525 F. 2d 999, 1004 (2d Cir. 1975); *United States* v. *Barrentine,* 591 F. 2d 1069, 1077-1081 (5th Cir.), cert. denied, 444 U.S. 990 (1979); *United States* v. *Eisler,* 567 F. 2d 814, 818 (8th Cir. 1977).[3]

2. Petitioner also claims (Pet. 16-20) that although the indictment charged a single conspiracy to deal in counterfeit bills, the evidence at trial showed two conspiracies involving $20 and $100 bills. That variance, in petitioner's view, invalidates his conspiracy conviction. This claim is also without merit.

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[3] *United States* v. *Lewis,* 511 F. 2d 798 (D.C. Cir. 1975), relied on by petitioner, has no bearing here. In that case, the prosecutor deliberately misinformed defense counsel that no oral statements by the defendant existed or would be used. The prosecutor nonetheless made use of such a statement at trial. The court of appeals reversed the defendant's conviction, finding that the prosecutor had affirmatively and knowingly misled the defense and that the statement may have had a significant impact on the outcome of the trial. No similar circumstances are presented here.

Initially, we note that even if the issue presented by petitioner were otherwise deemed appropriate for review by this Court, review is not necessary in this case. Petitioner received a sentence on the conspiracy count (count 1) equal to and concurrent with the sentence imposed on the substantive count (count 2). See Pet. App. C-1. There is therefore no need for this Court to review petitioner's challenge to the conspiracy conviction. See *Barnes* v. *United States,* 412 U.S. 837, 848 n.16 (1973); *Andresen* v. *Maryland,* 427 U.S. 463, 469 n.4 (1976). Even if petitioner's conspiracy conviction were reversed, that disposition would not affect his sentence, would not avert any collateral consequences, and would not affect the time he must serve before release on parole (see 28 C.F.R. 2.20).

In any event, as the district court correctly found (Pet. App. D-4), "[o]n the evidence in this case, the jury could have and evidently did find that the defendants were united in a common scheme." The court added that "[t]he government is not precluded from charging a master conspiracy in a single indictment and then establishing at trial, that under the master conspiracy, there were more than one subsidiary schemes." *Ibid.* It is, of course, immaterial that petitioner himself did not participate in every phase of the conspiracy, or that he was not personally linked to each of the distributors of counterfeit currency, since the evidence showed that he knew of the conspiracy's general scope and willingly associated himself with it. See *Blumenthal* v. *United States,* 332 U.S. 539, 556-558 (1947); *United States* v. *Bobo,* 586 F. 2d 355, 370 n.20 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

Petitioner was clearly linked to the receipt and distribution of the counterfeit $100 bills (see pages 1-2, *supra*; see also Pet. 17-18). He also repeatedly admitted that he knew the persons who were distributing the

counterfeit $20 bills (Tr. 1480-1481, 1483). The evidence further showed that petitioner was directly involved with Rischitelli and Galayda, who formed the core group that directed the distribution of bills of both denominations. Under these circumstances, the jury could find the existence of a "master conspiracy" embracing "subsidiary schemes."[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]Finally, even if petitioner were correct in contending that the evidence showed two conspiracies in which he was a participant, rather than a single conspiracy, that did not prejudice his substantial rights, as the district court expressly found (Pet. App. D-4). See also *Berger* v. *United States,* 295 U.S. 78 (1935).

DOJ-1980-10